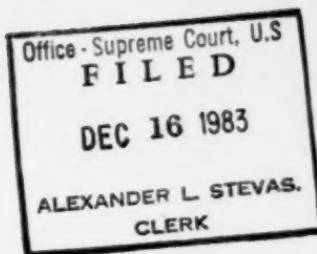


83-996



CASE NO:
IN THE SUPREME COURT OF
THE UNITED STATES

TERM: OCTOBER, 1983

ARTHUR LANCE BIER, PETITIONER
VS.
PAUL D. FLEMING, AND
CHARLES I. ALATIS, RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the State of Ohio is sufficiently connected to the actions of a heavily state regulated private harness racing association to constitute state action for the purpose of 42 U.S.C. §1983, where state racing officials, who had previously allowed the petitioner's name to be listed as the driver of various horses to be raced on August 12, 1977, subsequently removed his name from the program and refused to program him, and therefore, prohibited him from racing.
2. Whether, Respondent, Fleming

should be accorded the defense
of qualified immunity under 42
U.S.C. §1983, where he revoked
Petitioner's license to race
without due process, after he
had been informed that a prior
hearing was a necessary
requirement.

GROUND FOR JURISDICTION

This petition is within the time limit for filing as provided in 28 U.S.C. §2101(C). The Judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on September 19, 1983. 28 U.S.C. §2101(C) allows a petitioner for a writ of certiorari in a civil suit ninety (90) days from the date of entry of the judgment below.

The Supreme Court of the United States has jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit in this case on certiorari under 28 U.S.C. §1254 which provides

in part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree..."

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42, UNITED STATES CODE,

SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the parties injured in an
action at law, suit in equity, or
other proper proceeding for redress.

STATEMENT OF THE CASE

On August 8, 1977, Charles Alatis, the President and General Manager of the Painesville Raceways Meet, notified Arthur Bier, a man whose sole occupation is that of a horse driver-trainer, that he would have to vacate Northfield Race Track no later than 12:01 a.m., Friday, August 12, 1977. Alatis alleged that Bier had to leave because he was in violation of one of the associations rules (although the trial court stated that it appears that no one, except for Alatis, was aware of the rule). The state appointed Racing Judges cooperated with Alatis and also refused to

allow Bier to drive during the meet. It must be noted that there are three (3) Racing Judges for a meet. The presiding judge is appointed by the state and the other two (2) are appointed by the owners, or managers of the meet. All of the judges must be approved by the State Racing Commission. Bier was never given notice nor a hearing prior to his exclusion. A letter from Bier's attorney to the Ohio Racing Commission did not bring any action to reinstate his rights.

On August 12, 1977, Bier filed a Complaint and a Motion for a Temporary Restraining Order, which was issued by Judge Krupansky of the

Northern District Court of Ohio, in Case No: C77-863. Bier returned to the race track that night and made arrangements with some of the owner-trainers for when he was originally scheduled to drive, to drive their horses although he was not listed on the program, and even though some of them had already secured other drivers. Presiding Racing Judge William Hufford informed Bier that no late driver changes would be allowed; however, when Bier presented him with the restraining order, Bier was returned to some of his mounts; he lost three drives.

A hearing on Bier's Motion for a Preliminary Injunction, in Case No: C77-863, convened at 1:35 p.m., on August 23, 1977. At that hearing, William F. Snyder, counsel for Alatis informed the Court and Arthur Bier that Alatis would permit Arthur Bier to race in the meet.

The very next morning, August 24, 1977, between 8:30 and 8:45 a.m., Bier was hand-delivered a letter from the Ohio State Racing Commission, over Fleming's signature, informing him that it had come to the attention of the Commission that Bier was in "bad standing" before the New York State Racing and Wagering Board and that,

pursuant to Commission Rule
3769-3-23(B), his Ohio license was
revoked, effective that very day.
The Commission's letter further
advised Bier that he had a right to
a hearing on the revocation, upon
request, within thirty (30) days.
This was done despite the advise
from George Lord, former counsel of
the Commission, to the effect that
the Commission would have to provide
Bier a hearing before taking action
to revoke his license.

Arthur Bier again retained
counsel, who sent a letter to the
Commission on August 25, 1977,
protesting Bier's license and
requesting a hearing. A hearing was

held on September 7, 1977 and the revocation stood. The revocation was later reversed in the Summit County Common Pleas Court.

On January 18, 1978, Petitioner, Arthur Bier brought this civil rights action under 42 U.S.C. §1983 alleging that the respondents denied him due process of law by attempting on two occasions, to prohibit him from racing in the Painesville Meet at the Northfield Race Track, Northfield, Ohio. The District Court had jurisdiction to hear the case under 28 U.S.C. 1343(3).

The district court held in favor of Bier, concluding that

Bier's occupation as a harness horse race driver-trainer was an appropriate liberty and property interest protected by the Fourteenth Amendment, and therefore, he was entitled to procedural due process before his right as a harness race driver was infringed. Bier v. Fleming, 538 F.Supp. 437 (N.D. Ohio 1981).

Both Respondents appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. Charles Alatis contended mainly that his actions did not amount to state action within the meaning of §1983. Paul Fleming asserts that he acted in

good faith and therefore should have been accorded the defense of qualified immunity.

The United States Court of Appeals for the Sixth Circuit held that Alatis' actions did not constitute state action for the purposes of §1983 (a decision clearly in conflict with Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d, 589 (3rd Cir. 1979)), and that the district court erred in not according Fleming the defense of qualified immunity. The Court on September 19, 1983 reversed and remanded the case with directions to dismiss the complaint.

**It is from this judgment that
Petitioner Arthur Lance Bier
respectfully seeks certiorari.**

ARGUMENT FOR GRANTING CERTIORARI

The first question presented for review, i.e., whether the State of Ohio is sufficiently connected to the actions of an officer of a harness racing association to constitute state action for the purposes of 42 U.S.C. §1983, should be reviewed by this honorable court because there are special and important reasons therefor. The reasons are as follows:

1. The decision of the Sixth Circuit Court of Appeals is in conflict with the decision of the Third

Circuit Court of Appeals on
the same manner.

2. The decision of the Sixth
Circuit Court of Appeals
leaves the area of law
regarding "state
action" in a serious state
of confusion.

These reasons are expressly
listed in Supreme Court Rule 17 as
being of the character that will be
considered special and important by
the Court.

The decision of the Sixth
Circuit Court of Appeals is in
conflict with a decision of the
Third Circuit Court of Appeals on
the same matter. It should be clear

from this Court's decision in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), that the inquiry into state action must be, "whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." 419 U.S. at 351. It is also clear from this Court's decision in Burton v. Wilmington Parking Authority, 326 U.S. 715 (1961), that "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true

significance." 326 U.S. at 722.

Fitzgerald v. Mountain Laurel

Racing, Inc., 607 F.2d 589 (3rd Cir. 1979), is a case which applied this law, and found state action for purposes of 42 U.S.C. §1983. The Sixth Circuit decision in the instant case is in direct conflict with Fitzgerald.

The key facts of Fitzgerald involve the narrow circumstances under which Mountain Laurel exercised its right to expel Fitzgerald under the terms of the stall agreement. The impetus for Fitzgerald's expulsion came from Mountain Laurel's suspicion that Fitzgerald was engaging in

"inconsistent driving," a violation of Racing Commission Rules. It is undisputed that prior to exercising its rights under the stall agreement, Mountain Laurel's management met with the presiding Racing Judge and the Racing Secretary who confirmed the allegation of inconsistent driving against Fitzgerald. Plainly, the Racing Judges possessed delegated authority from the Commonwealth of Pennsylvania to discipline Fitzgerald for inconsistent driving under the Racing Commission Rules, yet no decision to suspend Fitzgerald was made at Mountain Laurel's meeting with the Racing

Officials. Rather from that meeting emanated Mountain Laurel's decision to evict Fitzgerald under the option to vacate in the stall agreement. The decision to evict Fitzgerald was communicated to him by the Racing Secretary allegedly acting solely in his capacity as a representative of management.

The Court in Fitzgerald applied the "close nexus" test established under Jackson. The Fitzgerald court stated that:

"To establish the presence of state action under Jackson, Fitzgerald must show a sufficiently "close nexus" between the states participation in Harness Racing and Mountain Laurel's act of expelling him so that Mountain Laurel's act of expelling him

"may be fairly treated as that of the state itself." Jackson, supra, 419 U.S. at 531."

Based on the stated facts and the applicable law the court held:

"The presiding acting judge and racing secretary acting in their official capacities, participated in the decision to expel Fitzgerald. In so doing, the racing officials "put their weight" behind the challenged expulsion by telling Mountain Laurel that Fitzgerald was violating commission rules and by approving the ensuing expulsion." 607 F.2d at 599.

The Court held further:

"Officials of the Racing Commission personally and actively participated in the specific conduct challenged by Fitzgerald. Their opinion as racing officials and judges of Fitzgerald's conduct precipitated the ensuing summary expulsion. This is hardly the remote action presented by Jackson."

It is clear from Fitzgerald that the rendering of an opinion by a state official which leads to expulsion of an individual by a private citizen is state action for the purposes of 42 U.S.C. §1983. Accordingly the District Court in the instant case followed this decision and found state action. The Sixth Circuit Court of Appeals, in the Bier case rejected this standard. It held, despite the fact that the trial court had made a finding that state officials actively participated in keeping an individual off the race track, that the action of the state officials did not rise to the level of state

action. Such a decision is clearly in conflict with Fitzgerald and conflicts with the spirit of the Jackson decision.

The resolution of these conflicts is of special importance. At stake is the constitutional rights of individuals. If the conflict continues, people in the Third Circuit will be afforded their constitutional rights through 42 U.S.C §1983, while the same individual would be denied such an action in the Sixth Circuit. This would encourage unjust results, and increase forum shopping.

This also is of great importance because the Sixth Circuit

decision as it stands leaves the law
on state action in chaos.

Permitting such a decision to stand
without review, would allow a
circuit court of appeals to
arbitrarily decide when state action
exists without regard to precedent
and findings of fact by the lower
court. This would surely be the law
in the Sixth Circuit and one can
only speculate what the other
circuits would do.

In the instant case the
District Court acknowledged how
critical the facts were and made
specific findings. One critical
finding was that the state racing
officials had removed Arthur Bier's

name from the program and refused to program him. Applying the law established by this Court and the Court in Fitzgerald, Judge Aldrich concluded that not only had the state been shown to be sufficiently connected with the challenged conduct of Alatis to pass the close nexus test of Jackson; the state racing officials had been coerced into actually participating in Alatis' actions even more blatantly than did the racing officials in Fitzgerald. Bier v. Fleming, et al., 538 F. Supp. 437 at 441 (N.D. Ohio 1981. The Sixth Circuit tries to distinguish the instant case by stating that the state racing

officials merely approved of the action. But this is clearly not the case. In the instant case the state racing officials did more than just approve, they removed Arthur Bier from the program and refused to program him further.

Therefore, we ask that this Court grant certiorari as to the first question presented for review because of its special importance and so that it may clear up the status of the law in this critical area.

The second question presented for review, i.e., whether respondent, Fleming should be accorded the defense of qualified

immunity under 42 U.S.C. §1983,
where he revoked Petitioner's
license to race without due process,
and after he had been informed that
a prior hearing was necessary,
should be reviewed by this Honorable
Court because there is a special and
important reason therefor. This
court should review this question
because the Sixth Circuit has
departed so far from the accepted
and usual course of judicial
proceedings, which has resulted in a
great injustice. This reason is
expressly listed in Supreme Court
Rule 17.1(a) as being of the
character that will be considered
special and important by this Court.

The Sixth Circuit Court of Appeals departed from its usual course of judicial proceedings when it reviewed the District Court's finding of fact and did so in an arbitrary fashion. The Sixth Circuit in determining whether to grant Fleming qualified immunity considered only part of the evidence and totally disregarded the findings of fact made by Judge Aldrich.

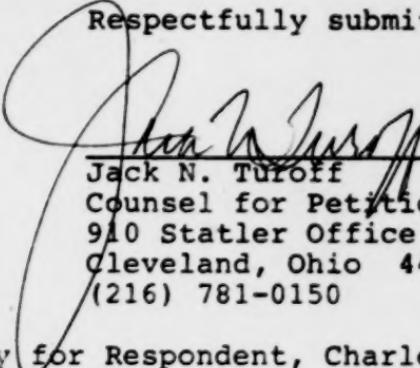
The Sixth Circuit at page 9 of its Opinion discusses a part of testimony made by George Lord. The Court focuses in on the fact that George Lord, counsel for the Commission at that time, had reviewed a letter for Fleming that

led to Bier's license revocation. The Court did not consider however, the fact that George Lord had informed Fleming that a hearing was necessary before he could revoke Bier's license. The Court further ignored the District Court's responsibility to make judgments based on credibility. Instead, they took a piece of evidence out of context, to obtain a desired result.

This is clearly of special importance as its is outside the scope of the Appellate Courts review. It is for this reason that the petitioner respectfully requests this court to grant certiorari as to

the second question presented for review.

Respectfully submitted,



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APPENDIX

1. Opinion of the United States
Court of Appeals for the Sixth
Circuit.
2. District Court Opinion

OPINION
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Decided and Filed September 19, 1983

Before: Edwards, Chief Circuit
Judge, Lively, Circuit Judge, and
Phillips, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge.

Plaintiff-appellee brought this
civil rights action under 42 U.S.C.
§1983 alleging that

defendants-appellants denied him due
process of law by attempting, on two
occasions, to prohibit him from
racing in the Painesville Meet at
the Northfield Race Track,
Northfield, Ohio.

The district court held in
favor of Bier, concluding that
Bier's occupation as a harness horse

race driver-trainer was an appropriate liberty and property interest protected by the fourteenth amendment, and therefore, he was entitled to procedural due process before his right as a harness race driver was infringed. Bier v. Fleming, 538 F. Supp. 437 (N.D. Ohio, 1981). Reference is made to the opinion of the district court for a detailed recitation of pertinent facts.

Specifically, as to Charles Alatis, president and general manager of Painesville Raceway, Inc., the district court held that his action of attempting to prevent Bier from racing on August 12, 1977,

constituted state action and infringed plaintiff's property and liberty interests without due process of law. With respect to Paul Fleming, Executive Secretary of the Ohio Racing Commission, the district court ruled that he revoked Bier's racing license without a prior hearing in violation of state law and the due process clause of the fourteenth amendment. For these violations, the district court awarded plaintiff \$30.00 compensatory damages against Alatis, \$1.00 nominal damages Fleming, and attorney fees against both Alatis and Fleming in their personal and official capacities.

Both defendants appeal the district court's decision, citing several reasons for reversal. Charles Alatis contends mainly that his actions did not amount to state action within the meaning of § 1983. Paul Fleming asserts that he acted in good faith and therefore should be accorded the defense of qualified immunity.

We hold that, under the peculiar facts and circumstances of this case, appellant Alatis' actions did not constitute state action for purposes of § 1983 and that the district court erred in not according Fleming the defense of qualified immunity. Accordingly, we

reverse and remand the case with directions to dismiss the complaint. We do not reach the question whether Bier was deprived of any right, privilege or immunity secured by the Constitution or laws of the United States without due process.

I

Painesville Raceway, Inc. (Painesville), an Ohio corporation, is a permit holder licensed to conduct horse racing meets in Ohio. See Ohio Rev. Code Ann. § 3769.01 (Page 1980). In conducting one of four meets each year, Painesville leases Northfield Park, a privately owned and operated race track facility. Painesville employs all

personnel necessary to conduct the meet, including security guards and state racing officials.

Bier intended to race in the Painesville Meet. However, on August 8, 1977, four days prior to the opening of the meet, Alatis notified Bier that his application for stall space had not been received and that Bier would have to vacate the stall space he acquired previously at Northfield. Concomitantly, Alatis was informed that Bier would not have any training responsibilities during the Painesville Meet and that he intended merely to ride horses for various owners. Claiming that Painesville had a rule prohibiting

"catchdrivers" from participating in its meets, Alatis instructed security personnel not to admit Bier on the Northfield premises.

Additionally, Alatis instructed the racing office to remove Bier's name as a driver from the racing program.

On August 12, 1977, Bier filed a complaint in the district court and obtained a temporary restraining order preventing his exclusion from the Painesville Meet. Thereafter, Bier returned to Northfield Park and participated in the meet.

The district court held that Alatis' conduct constituted action under color of state law for purposes of § 1983. The court

concluded that the State became involved in otherwise private actions when state racing officials upon Alatis' instructions, removed Bier's name from the racing program. See 538 F.Supp. at 446. We disagree and conclude that plaintiff failed to demonstrate the requisite degree of state action necessary to maintain a claim for relief under § 1983.

To be entitled to relief under § 1983, plaintiff must establish that defendant deprived him of a right by the Constitution and the laws of the United States and that the deprivation occurred under color of state law. See Flagg Brothers,

Inc. vs. Brooks, 436 U.S. 149, 155 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). "The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the state?'" Rendell-Baker v. Kohn, --U.S.--,-- 102 S.Ct. 2764, 2770 (1982), quoting Lugar v. Edmondson Oil Co., Inc., --U.S.--,-- 102 S.Ct. 2744, 2754, (1982) (holding that conduct which satisfied the "state action" requirement of the fourteenth amendment satisfied also the "under

color of state law" requirement of §1983). There must be a sufficiently close nexus between the state and the conduct challenged so that defendant is treated as a state actor and defendant's act is treated as that of the state. See Lugar, supra, --U.S. at --, 102 S. Ct. at 2754-55; Blum v. Yaretsky, --U.S.--, ---, 102 S. Ct. 2777, 2786 (1982), quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). Accordingly, the party charged must be a state official, or he must have acted together with or received significant aid from state officials, or his conduct otherwise

must be chargeable to the state.

Lugar, supra, --U.S. at --, 102 S. Ct. at 2754.

The Supreme Court has developed the so-called nexus test to determine whether conduct of a private actor is fairly attributable to a state. Under this test, a finding of state action may be made when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson, supra, 419 U.S. at 351. See also Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-25 (1961). Under this

approach "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." Jackson, supra, 419 U.S. at 350. In essence, it must be demonstrated that the State is intimately involved in the challenged private conduct in order for that conduct to become attributable to the state for purposes of a § 1983 action.

The required nexus may be established by showing that the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law

be deemed to be that of the State."

Blum, supra, --U.S. at --, 102 S.Ct. at 2786. See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-73 (1972); Adickes, supra, 398 U.S. at 170 Also a nexus may be established if the private entity has exercised powers that are "traditionally the exclusion prerogative of the State."

Jackson, supra, 419 U.S. at 353.

See also Blum, supra, --U.S. at --, 102 S. Ct. at 2786; Flagg Brothers, Inc., supra, 436 U.S. at 157-61.

Analyzed in the light of these considerations, we conclude that the district court's finding of state action cannot stand. Painesville Raceway, Inc., is a private

corporation. Defendant Alatis, as Painesville's president and general manager, performs as a private individual in discharging his corporate duties and responsibilities. Although the State regulates heavily the horse racing industry, such extensive regulation does not, in itself, transform otherwise private actions into state action for purposes of §1983. See Blum, supra, ---U.S. at --, 102 S. Ct. at 2786, quoting Jackson, supra, 419 U.S. at 350. Likewise, even though the State derives revenue from race track operations, such benefits can hardly be viewed as automatically

converting private acts into state action. See Fulton v. Hecht, 545 F.2d 540, 542-43 (5th Cir.), cert. denied, 430 U.S. 984, reh'g denied, 431 U.S. 975 (1977) (financial benefits accruing to a state from the continued operation of dog racing track do not convert private conduct into state action).

Additionally, there is no dispute that it was a private decision, on the part of Alatis, to exclude Bier from the Painesville Meet.

Similarly, it was Alatis who instructed security guards not to permit Bier on the Northfield premises. The only record evidence of any connection between Alatis'

conduct and that of the State, is one isolated incident of the racing officials removing Bier's name from the racing program upon Alatis' request.

We conclude that the conduct of the racing officials was not a sufficient exercise of coercive power or significant encouragement on the part of the State to find state action in an otherwise private decision. Accordingly, "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." Blum, supra,

--U.S. at --, 102 S. Ct. at 2786,
citing Flagg Brothers, Inc., supra,
436 U.S. at 164-65; Jackson, supra,
419 U.S. at 357.

To support the finding of state action plaintiff, as well as the district court, rely heavily on the Third Circuit's decision in Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589 (3d Cir. 1979), cert. denied, 446 U.S. 956 (1980) (finding a sufficiently close nexus between the State and a racing company's actions). In that case a horseman suspected of not giving his best effort was suspended from the track by the racing company. The company suspended the horseman only

after it conferred with state officials and notified the horseman of the suspension in the presence of state officials. Further, the company was acting to enforce a state racing rule. None of the above factors found in Fitzgerald are present in the case at bar and the Third Circuit emphasized that it was the presence of those factors that led it to find state action. See 607 F.2d at 597-99. Moreover, under the particular facts and circumstances of this case, we find persuasive Judge Adams' well articulated reasoning in Fitzgerald as expressing a better rule. See

607 F.2d at 604-11 (Adams, J., dissenting).

Therefore, we hold that the record does not support the conclusion that defendant Alatis acted under color of state law in attempting to exclude Bier from the Painesville Meet.

II

On August 24, 1977 Bier was hand-delivered a letter from the Ohio Racing Commission, over defendant Paul Fleming's signature, notifying him of the Commission's decision to revoke his racing license. The district court held that such action violated state law and fourteenth amendment due process.

principles. In rejecting Fleming's claim that he acted in good faith and, therefore, should be accorded the defense of qualified immunity, the court noted that the Commission's attorney had informed the Commissioners that they could not revoke Bier's racing license without a pre-termination hearing and, despite this knowledge, Fleming sent the August 24th letter to Bier stating that his license was "hereby revoked." The court concluded that Fleming, although a "state employee in a position of considerable authority," could not avail himself of the qualified immunity defense since he "did not rely on the advice

of counsel." 538 F. Supp. at 447, 449. We find the district court's decision unsupported by the record and hold that Fleming is entitled to the defense of qualified, good faith immunity.

State officials have a right to qualified immunity for actions taken in their official capacity if they acted in good faith and on the basis of a reasonable belief that their actions were lawful. See Wood v. Strickland, 420 U.S. 308, 318-22, reh'g denied, 421 U.S. 921 (1975); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974); Hall v. United States, 704 F.2d 246, 249-50 (6th Cir. 1983). See also Butz v.

Economou, 438 U.S. 478, 504 (1978)

(deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"). Under the doctrine of qualified, good faith immunity, a government official performing acts within the scope of official conduct is insulated from damages under §1983 if (1) at the time and in light of all circumstances there existed reasonable grounds for the belief that the action taken was appropriate and (2) the officer

acted in good faith. See Scheuer,
supra, 416 U.S. at 247-48.

The parameters of this defense were clarified recently by the Supreme Court in Harlow v. Fitzgerald, --U.S.--, --, 102 S.Ct. 2727, 2737 (1982):

Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. 308, 320, 95 S. Ct. 992, 999, 43

L.Ed.2d 214 (1975). The subjective component refers to "permissible intentions." Ibid. Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of

the [plaintiff], or if he took
the action with malicious
intention to cause a
deprivation of constitutional
rights or other injury...."

Id., at 321-322, 95 S. Ct. at
1000-1001 (emphasis added;
Footnote omitted).

See also Hall, supra, 704 F.2d at
250. Therefore, to the extent that
good faith is defined essentially in
objective terms, if defendant
Fleming did not know his conduct
violated Bier's constitutional
rights, then he is entitled to a
good faith defense. For purposes of
this inquiry we assume, without
deciding, that Bier did suffer a

constitutional deprivation without
due process of law.

As indicated, the district court found the absence of good faith in concluding that Fleming drafted and signed the August 24th letter against the advice of legal counsel. However, we find the district court's conclusion unsupported by the record. Mr. George E. Lord, legal counsel for the Racing Commission, testified as follows:

Q. Handing you what has been identified as Defendants' Exhibit D-2, have you seen that document before, Mr. Lord?

A. Yes.

Q. Would you tell the Court
what it is?

A. It is a proposed letter to
be sent to Mr. Bier as a result
of the conference that we have
been discussing right here.

Q. Was that prepared after the
telephone conference?

A. Or at the close of it.
During it, yes.

Q. Did you prepare that
document, yourself?

A. No.

Q. Do you know who did?

A. It would be my guess it
would be Mr. Fleming.

Q. Now, how was that document
presented to you, for what

purpose?

A. For my approval.

Q. Did you approve it as it
was presented to you?

A. No.

Q. In what way did you dis-
approve it.

A. I instructed Mr. Fleming to
delete the last line of the
first paragraph, which
reads: "by action taken by
said commission on August
24, 1977." And as the
document appears today,
that is crossed out.

Q. After that correction was
made, did you approve the
language in that rough

draft?

A. Yes.

Q. And did you indicate your approval on it?

A. Yes; it appears in the upper left-hand corner.

Q. And what does it say?

A. It says, "Draft OK GEL."

Q. Did you have a -

THE COURT: Excuse me. Wasn't that what the Commission actually did, though, in that phone call? Did they decide to revoke Mr. Bier's license?

THE WITNESS: They wanted to revoke it, and my advise to them was that they could not do that by phone call and they had to give him a

hearing before it could be revoked.
And that is why that last line was
stricken from the notes.

This testimony indicates
clearly that counsel believed that
the content of the letter was
consistent with his advice to the
Commission and that Fleming's
actions as Executive Secretary were
consistent with the advice of
counsel. Therefore, we hold that
Fleming had reason to believe he was
performing his official duty in a
reasonable and appropriate manner
and in good faith belief that his
actions would not result in a
deprivation of Plaintiff's
constitutional rights. We conclude

that the district court erred in not granting Fleming the defense of qualified, good faith immunity.

Accordingly, the judgment of the district court is reversed and the cause remanded with directions to dismiss the complaint. The costs of this appeal are taxed against the plaintiff-appellee, Arthur Bier.

OPINION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

This action came on for trial (hearing) before the Court, Honorable Ann Aldrich, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, in favor of the plaintiff against defendants, Fleming & Alatis, and in favor of defendant Stehmeyer.

It is Ordered and Adjudged that the plaintiff recover from defendant, Paul D. Fleming, Jr., nominal compensatory damages in the sum of \$1.00 in his personal capacity plus costs.

IT IS FURTHER ORDERED that plaintiff recover from defendant, Charles I. Alatis, compensatory damages in the sum of \$30.00 plus costs.

IT IS FURTHER ORDERED that the plaintiff recover attorney fees from defendant Charles I. Alatis and defendant Paul D. Fleming, Jr., both in his personal capacity and his official capacity.

IT IS FURTHER ORDERED that the court's memorandum and order filed on August 25, 1981, is hereby adopted as findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

Dated at Cleveland, Ohio, this 25th day of August, 1981.

/s/ ANN ALDRICH
Ann Aldrich, U.S. District
Judge

MEMORANDUM AND ORDER

Plaintiff Arthur Lance Bier, a harness horse driver-trainer, alleges that on August 12, 1977, he was deprived of his right to drive during the Painesville Meet at Northfield Park Racetrack by the defendant, Painesville President and General Manager, Charles Alatis. Bier further alleges that Alatis, together with defendants Paul Fleming, Jr., and Henry Stehmeyer (Executive Secretary of the Ohio State Racing Commission, and one of its employees, respectively), caused the Ohio State Racing Commission to revoke Bier's license on August 24, 1977, without a hearing, in

violation of Ohio Revised Code
§119.06 and due process clause of
the Fourteenth Amendment. Further,
Bier alleges that these defendants
continued to conspire to violate his
civil rights by interfering with his
driving rights in the State of Ohio,
which resulted in the Ohio Racing
Commission refusing to issue him a
license for 1978; and that on
January 2, 1978, defendants Fleming
and Stehmeyer directed the Presiding
Judge at Northfield Park to remove
Bier from his drives, thereby
causing him to lose income and
damaging his reputation in his
profession. Plaintiff brought this
action under the Fourteenth

Amendment and 42 U.S.C. §§1983 and 1985, seeking injunctive relief, compensatory and punitive damages, attorney's fees and costs. Bier also alleged state law claims of libel and slander, pursuant to 28 U.S.C. §1332.

Prior to trial this Court dismissed Bier's claims under 42 U.S.C. §1985, as well as his state law claims. In addition, the Ohio State Racing Commission was dismissed on Eleventh Amendment grounds. Bier proceeded to trial on his due process claims under the Fourteenth Amendment and 42 U.S.C. §1983. This Court has jurisdiction.

Upon consideration of the evidence adduced at trial, the Court finds that defendant Alatis, acting under color of state law, did deprive Bier of his right to drive at Northfield Park on August 12, 1977, without due process of law in violation of the Fourteenth Amendment and §1983. Further, the Court finds that defendant Fleming did cause Bier's license to be revoked on August 24, 1977, without according him due process as required by the Fourteenth Amendment and §1983. Both of these defendants are liable to the plaintiff for compensatory damages, attorney's fees, and the costs of this action.

An award of punitive damages is not warranted in this case.

There was no evidence to support any of Bier's claims against defendant Stehmeyer; therefore, he is dismissed as a defendant.

FINDINGS OF FACT

I

Plaintiff Arthur Lance Bier, whose sole occupation is that of a harness horse driver-trainer, has been in the harness horse business for twenty-two years. He has been licensed as a driver-trainer since 1961, and has trained and raced horses on various tracks throughout the country. Throughout these years Bier has also worked as a

"catchdriver"--i.e., one who races horses that are trained by someone other than himself. In 1974, Bier became licensed as a driver-trainer in the State of Ohio, and began racing at Raceway Park in Toledo. At the end of that year he was the leading driver in Toledo, finishing with the highest percentage in the state, and ranking eleventh in the country. Bier began driving at Northfield Park Racetrack (Northfield) in 1976, racing those horses that he trained and also racing as a catchdriver. As such, Bier frequently raced horses for Ray Fisher, a licensed owner-trainer of horses, and he was the exclusive

driver for Earl Simmons, another owner-trainer.

Defendant Paul D. Fleming, Jr., is and has been since 1963, the Executive Secretary of the Ohio State Racing Commission (Commission), the state agency responsible for regulating horse racing in Ohio. As the full-time executive officer of the Commission, Fleming is responsible for the day-to-day operation of the office, acting as the custodian of the records, and performing other details as prescribed by the Commission. Fleming has 25 to 30 employees under his supervision, including Henry Stehmeyer who was,

in 1977, the Chief Investigator for
the Commission.

Defendant Charles Alatis is the
President and General Manager of the
the Painesville Raceway,
Incorporated (Painesville), a permit
holder licensed to conduct racing
meets in Ohio, pursuant to Chapter
3769 of the Ohio Revised Code.
Painesville leases the track and
facilities at Northfield to conduct
one of four racing meets each year.
During its meet, Painesville employs
all staff and personnel necessary to
conduct the meet, including the
racing judges (who are officials of
the Commission). The Presiding
Judge, who is actually appointed by

the Commission, is on the payroll of
Painesville pursuant to Commission
Rule 3769-5-27.

In 1977, the Painesville Meet
commenced on August 12, and
continued to November 12, 1977.
Defendant Alatis arrived at
Northfield several days prior to the
opening of the Painesville Meet to
prepare for the operation of the
meet. On August 8, 1977, Alatis
wrote a letter to Arthur Bier
informing Bier that his application
for stall space had not been
received and that, as a consequence,
Bier would be required to vacate the
premises at Northfield no later than
12:01 a.m., Friday, August 12,

1977.¹ Bier had not made application for stall space and he testified that he did not intend to apply for stall space during the Painesville Meet. After Bier received his letter he had a conversation with Alatis in which Alatis informed Bier that he could not drive at "his meet". Alatis then instructed his security people not to admit Bier on the premises at Northfield.

¹ Bier had been racing at Northfield during the meet prior to the Painesville Meet. He also had stall space for his horses during the previous meet; however, the record is not clear as to whether he had horses at Northfield on August 8, 1977.

Prior to opening day of the Painesville Meet, Bier was listed in the entry box and on the overnight sheets,² as the driver of six horses that would be racing commencing August 12. However, Alatis instructed the racing office--i.e., the racing secretary and the judges--not to permit Bier's name to appear on the program as

² When a person wishes to enter a horse in a particular race, an entry listing, inter alia, the name of the horse, the owner, trainer, and driver, must be placed in the "entry box" (which is controlled by the judges) three days prior to the race. The overnight sheet (which contains information regarding the number and conditions of races, the purse, the names of horses and their post positions, and the driver's name) is then prepared by the racing secretary and placed in the paddock boxes for the information of the horsemen who entered the race.

driver of any of the horses that would be racing commencing August 12. Subsequently, Bier's name was removed and he was not programmed to drive any horses on August 12.

On August 12, 1977, Bier filed a Complaint and a Motion for Temporary Restraining Order, which was issued by Judge Krupansky of this Court, in Case No: C77-863. Bier returned to Northfield Park that night and made arrangements with some of the owner-trainers for whom he was originally scheduled to drive, to drive their horses although he was not listed on the program, and even though some of them had already secured other

drivers. Presiding Judge William Hufford informed Bier that no late driver changes would be allowed; however, when Bier presented him with the restraining order, Bier was returned to some of his mounts; he lost three drives. Once the driver changes were made there was an announcement over the public address system that Painesville Raceway did not want Arthur Bier to race, and that the only reason he was allowed to race was because of a federal court order.

Alatis testified that he refused to allow Bier to drive because Bier was a catchdriver and, according to Alatis, Painesville

Raceway has a longstanding "rule" prohibiting catchdrivers from racing during its meet.³ Alatis made the determination that Bier was a catchdriver when he "heard" that Bier no longer had training responsibilities.⁴ Despite the fact that Alatis knew that on August 6, 1977, Bier was listed on a

³ Although Alatis stated this "catchdriver rule" had been in existence for sixteen years, he could not recall whether it was posted or whether it was merely custom. It appeared at the trial that no one, except for Alatis, knew of the existence of the rule.

⁴ As was the case with a great portion of his testimony, Alatis could not recall where he got this information regarding Bier's lack of training responsibility.

program of a previous racemeet as a trainer, he never communicated with Bier to find out whether Bier in fact still served in that capacity. While Alatis claimed not to recall Bier specifically, he did admit that he would have instructed the racing judges not to allow catchdrivers to be programmed to drive, if they had no training responsibilities. The "rule", Alatis explained, was to preserve the integrity of the sport and to maintain the confidence of the public.

II

On August 17, 1977, Bier's attorney wrote a letter to the Chairman of the Commission (with

copies to defendant Fleming, and to George Lord, counsel for the Commission), informing the Commission of Alatis' actions and requesting the Commission to immediately order Painesville to permit Bier to continue to drive in the Painesville Meet, subject only to Commission rules. This letter was received by the Commission on August 19, 1977; however, no response was made nor was any action taken by the Commission.

A hearing on Bier's Motion for a Preliminary Injunction, in Case No. C77-863, convened at 1:35 p.m., on August 23, 1977. Because of a prior agreement with Alatis'

attorney, Bier dismissed his own attorney and appeared at the hearing pro se. All other parties ⁵ were represented by counsel, including counsel for the Commission, George Lord. At that hearing, William F. Snyder, counsel for both Alatis and the racing secretary, Joseph DeFrank, had the following colloquy with the Court:

MR. SNYDER: If the Court please, in Case No. 77-863, which is the case which involved Mr. Arthur Lance Bier:

⁵ In addition to Alatis, other defendants in that action were Painesville Raceway, Inc.; The Ohio Harness Horsemen's Association, Inc.; the Ohio Racing Commission; William Hufford, the Presiding Judge; Northfield Raceway, Inc.; and Joseph DeFrank, the Racing Secretary.

Speaking on behalf of Painesville Raceway, Inc., its General Manager, Charles Alatis, and its Racing Secretary, Joseph DeFrank, we have taken the position previously in this Court, and I take it here of record, that so long as Arthur Lance Bier is licensed by the State of Ohio to act as a driver in harness racing tracks in the State of Ohio, we have no objection and will in no way act to prevent him from driving.

Mr. Bier has not asked for stalls during this present meet, so I would suggest that the issue as between us is totally moot at this time, your Honor; . . .

THE COURT: Mr. Bier, in view of the position taken by the defendants in this action, and in view of the fact that you will not in any way be precluded from driving so long as you maintain your driver's license on a current basis with the State of Ohio, it would appear that the issues raised by your complaint are moot.

Is it your desire to withdraw your complaint and dismiss it?

MR. BIER: Yes, sir.

THE COURT: Very well.***
Your case is dismissed.

(Transcript of Proceedings, Case No.
C77-863, pp.3-4.)

The following morning, August 24, 1977, between 8:30 and 8:45 a.m., Bier was hand-delivered a letter from the Commission, over Fleming's signature, informing him that it had come to the attention of the Commission that Bier was in "bad standing" before the New York State Racing and Wagering Board, and that, pursuant to Commission Rule 3769-3-23(B), his Ohio license was revoked, effective that very day. The Commission letter further advised Bier that he had a right to

a hearing on the revocation, upon
request, within 30 days. ⁶

⁶ This Court's credulity is taxed by the testimony of defendants and their witnesses concerning this precipitous action by the Commission, and the reasons therefor (including the assertion that it was sheer "happenstance" that the action took place the day after the hearing before Judge Krupansky). Fleming testified that he sent the letter to Bier as a result of an "emergency telephone meeting" held by the Commission on the morning of August 24. He also introduced into evidence Def.'s Exhibit D-1, which was identified as the minutes of that emergency meeting. George Lord, former counsel to the Commission, testified that he was called to the Commission office around mid-day on August 24, and that this telephone "conference" was already in progress. Present in the office were Henry Stehmeyer and Fleming (who was taking part in the telephone conversation). Although Lord was not a participant in the conference call, he identified the telephone voices of the other parties as being those of Chairman

Gurvis and William Petro, a Commission member. Lord characterized the telephone conference not as an "emergency meeting" but merely a telephone discussion of "new information" the Commission has recently received that Bier was in bad standing in the State of New York. The purpose of the conference was to determine what to do about the situation. This "new information" apparently came to the attention of the Commission by way of a letter to Stehmeyer, dated August 19, 1977, from Cyril Rooks, Jr., Assistant Counsel to the New York State Racing and Wagering Board (Def.'s Exhibit D-4). However, it is clear that the substance of the "new information" had already been divulged to the Commission by Bier himself when he applied, on January 6, 1977, for his 1977 license.

(The New York State Racing and Wagering Board had suspended Bier's license when he was arrested on a forged motor vehicle license charge. On June 1, 1976, the New York Supreme Court, Appellate Division, ordered Bier's license reinstated pending a hearing. On June 24, 1976, Bier was granted an Indefinite Temporary Permit to race by the Racing and Wagering Board. A hearing was never held, so it

Bier was not programmed and did not
drive on the night of August 24,

6
appears that Bier's license was never suspended or revoked in New York (See Goldberg deposition). Therefore, Bier was not subject to Rule 3769-3-23(B) on August 24, 1977).

Lord further testified that Fleming showed him a proposed letter to be sent to Bier (Def.'s Exhibit D-2) and asked him to approve the letter. After instructing Fleming to delete one line which read, "by action taken by said Commission on August 24, 1977", Lord approved the letter. Lord also advised Fleming and the Commission, at the time, that, under their rules, they could not make this decision by telephone call, but would have to provide Bier a hearing before taking action to revoke his license. Despite this advice, as the alleged minutes of the alleged meeting show, the Commission revoked Bier's license, effective August 24, and sent him a notice of opportunity for hearing.

1977. ⁷ He again retained counsel who sent a letter to the Commission on August 25, protesting Bier's license revocation and requesting a hearing. This letter apparently stayed any further action by the Commission, because Bier was permitted to drive. A hearing was held by the Commission at its regular meeting on September 7, 1977, at which time the Commission withdrew Bier's driving privileges

⁷ Because Bier became confused, during his testimony, about the events that took place on August 24 vis-a-vis those of August 12, it is unclear whether he was listed on the overnight sheet to drive on August 24, as he had been on August 12, 1977.

in the State of Ohio until he would become eligible in the State of New York. Bier was officially advised of this action by letter dated September 8, 1977. Bier then filed a Notice of Appeal to the Summit Country Common Pleas Court, pursuant to Ohio Revised Code §119.12. The Commission, and specifically defendant Fleming (who had the responsibility) failed to file a transcript of the Commission's proceedings with the Court, as required by statute, and was found to be in violation of Ohio Revised Code Section 119.12. Consequently, on November 18, 1977, the Common Pleas Court reversed and vacated the

Commission's revocation order
without hearing the case on the
merits.

Meanwhile shortly after Bier obtained the temporary restraining order of August 12, Alatis had instructed his security people at the racetrack to allow Bier on the track when he programmed to drive. He further instructed Nick Tagg, Director of Security, to allow Bier into the backstretch area only on the days when Bier was driving or was entering qualifying races. Bier could enter the backstretch in time to warm up horses before a race and could remain long enough to talk with the owner of the horses he

drove after a race. However, he was not permitted in the track kitchen, which was the usual congregating place for drivers, owners, trainers and other track people. Sometime after the Summit County appeal, Alatis instructed Billy George, the Presiding Judge, to pick up Bier's badge which admitted him to the backstretch. Consequently, Bier only was allowed on the premises when he was scheduled to drive, approximately 1-1/2 hours prior to a race. He was required to leave the premises immediately after he finished racing. This pattern continued for the duration of the Painesville Meet.

Bier claims that because of his restricted access to the backstretch, he was prevented from accepting job offers that were made to him by some of the owners and trainers at Northfield Park. This claim was supported by the testimony of owner-trainers Simmons and Fisher.

III

The licensing period for 1978 licenses began in late December, 1977. Ordinarily, persons who seek to have their licenses renewed can file their application at the racetrack with the presiding Judge who is authorized by the Commission to accept license applications and

fees. Arthur Bier presented his 1978 license application to Billy George, the Presiding Judge at Northfield Park, on December 26, 1977. Prior to that time George had been instructed by Stehmeyer not to accept Bier's license application; instead, George was to refer Bier to the Commission for licensing. Consequently, George refused to accept the application, informing Bier that he would have to get his license at the Commission office in Columbus. Bier and his attorney took the application to George two days later; the application was again refused, and Bier was again instructed to make application at

the Commission office. On December 31, 1977, Bier and his attorney went to the Commission office in an attempt to get Bier's 1978 license. Although it is unclear exactly what took place at the Commission office, one thing is certain--Bier did not receive his 1978 license at that time.

January 2, 1978 was opening night for the 1978 racing season. Arthur Bier was scheduled for four drives on that night; however, Billy George removed Bier from all his mounts and would not allow him to drive. George testified that he took this action because Bier did not have a license, and that

pursuant to Commission rules, permit holders could not allow unlicensed drivers to drive in a race. George specifically testified that none of the defendants, and no one from the Commission, instructed him to take this action. On January 5, however, Bier was allowed to return to his mounts. On January 6, 1978, the Complaint in this case was filed and a temporary restraining order, followed by a preliminary injunction, was issued by Judge Green of this Court. Prior to trial, this Court granted defendants Fleming and Stehmeyer's Motion in Limine to restrict evidence received

at trial to the date of the filing
of the Complaint.

CONCLUSIONS OF LAW

For Bier to prevail on his claims against the defendants he must establish that there were deprivations of a liberty or property interest within the context of the Fourteenth Amendment; and that the deprivations occurred without due process of law; and that the deprivations were effected by the state, or under color of state law.

I. The August 12, 1977 Claim

Bier asserts that he had both a constitutionally protected liberty and property interest in racing

horses at Northfield Park during the Painesville Meet, and that his exclusion by Alatis, without a prior hearing, deprived him of due process of law as guaranteed by the Fourteenth Amendment.

Alatis has entered a continuing objection to the Court's jurisdiction in this case, asserting that "time and time again Painesville Raceway, Inc., has been forced to defend Sec. 1983 actions at great expense and loss of time", only to have courts hold that its actions do not come within the

strictures of §1983. ⁸ The cases cited by Alatis involved the issue of the allocation of stall space by Painesville during the Painesville Meet. That issue is not present in this case. While it is true that the courts in Rapone and Stephens held that the requisite state action was not present in those cases, they certainly did not go so far as to suggest that none of Alatis' or Painesville's actions would ever

⁸ In support of his objection Alatis cites Rapone v. Painesville Raceway, Inc., C77-878 (N.D. Ohio, Sept. 1, 1977), and Stephens et al v. Painesville Raceway, Inc., C80-487, C80-515, C80-522A (N.D. Ohio, 1980).

come within the confines of the Fourteenth Amendment or §1983. The determination of the presence, or absence, of state action for purposes of §1983 is one that must be made on a case-by-case basis. Therefore, Alatis' objection is not well taken.

In pertinent part, 42 U.S.C §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States, . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

Painesville Raceway, Inc. is a private enterprise that conducts its

racing meets on private property it leases from Northfield Raceway, Inc., another private entity. It is well established that for any §1983 liability to attach to defendant Alatis' or Painesville's alleged wrongful activities, they must act under color of law or with the involvement or authority of the state. Burton v. Wilmington Parking Authority, 326 U.S. 715 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

Bier contends that Alatis' actions constitute state action for purposes of §1983 because of the

complete control exercised over harness racing by the State through the Racing Commission; the mutual economic benefits accruing to both the State and Painesville; the licensing requirements of the State for all persons connected in anyway (sic) with harness racing; and the pervasive regulations which govern all horse racing in the State of Ohio. Bier further contends that the State of Ohio and Painesville are partners in harness racing--the State as the "senior partner", establishing the rules and regulations and allocating the profits; Painesville, the "junior partner", conducting the day-to-day

operations of the business.

Therefore, Alatis, as General Manager of Painesville, is an instrumentality of the State. This very interrelationship between the State of Ohio and this private racing association, Bier argues, establishes the existence of a "symbiotic" relationship like that in Burton v. Wilmington Parking Authority, supra, which would constitute state action, thus entitling him to the protections of the Fourteenth Amendment.

At the outset, this Court rejects the claim of a symbiotic relationship, or of a partnership between the State of Ohio and

private racing associations such
that the activities of the private
associations are automatically
vested with the color of state law.

Cf., Rodic v. Thistledown Racing Club, C76-932 (N.D. Ohio 1977);
rev'd on other grounds, 615 F.2d 736
(6th Cir. 1980); Puntolillo v. New Hampshire Racing Commission, 390 F. Supp. 231 (D.N.H. 1975). It is true that the Racing Commission has substantial input by way of regulation into the operation of racetracks in Ohio. It is also true that there are mutual financial benefits that inure to the State and to the private permit holders. Moreover, through an extensive and

pervasive regulatory scheme, the State continually oversees virtually every detail of the operation of the permit holder's business. However, in Jackson v. Metropolitan Edison, supra, the Supreme Court noted that, "[t]he mere fact that a business is subject to [extensive and detailed] state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment." Id., 419 US.. at 350.

Under Jackson, the inquiry must be, "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated

as that of the State itself." 419 U.S. at 351. The challenged activity in this case is Alatis' exclusion of Bier at the beginning of the Painesville Meet on August 12, 1977, on the basis of his so-called "catch-driver rule".

Therefore, the specific inquiry here is whether the State of Ohio is sufficiently connected to the act of a heavily state regulated private harness racing association in excluding a licensed driver-trainer from its track, without a hearing, on the basis of a rule of the association, so that the association's action is state action for purposes of §1983. As the

Supreme Court stated in Burton,
supra, "only by sifting facts and
weighing circumstances can the
nonobvious involvement of the State
in private conduct be attributed its
true significance." 326 U.S. at 722.

The sequence of events in this
case is crucial. Alatis informed
Bier on August 8, 1977 that because
no application for stall space has
been received, Bier would be
required to vacate the premises at
Northfield Park. Alatis took this
action because he "heard" that Bier
no longer had training
responsibilities. Alatis then
informed Bier that he would not be
permitted to drive during the

Painesville Meet, and instructed his security people not to allow Bier on the premises. Alatis also instructed the racing officials--i.e., the racing secretary and racing judges--not to allow Bier to be programmed to drive any horses in races commencing on August 12. The racing officials followed Alatis' instructions despite the fact that when the race was drawn and the overnight sheets printed for the August 12 races, Bier was listed as the driver for Earl Simmons and other owner-trainers who had placed entries in the entry box on August 9. Prior to programming, Simmons

was paged to the judges' office where he was informed by Presiding Judge William Hufford that he would have to change drivers because Bier would not be driving. When Simmons questioned this action, Hufford gave Simmons a choice of making the driver change in advance, or paying a fine when he had to make a change later because Bier would not be available. ⁹

⁹ Simmons removed Bier's name and substituted that of Charles Williams. It was only after Bier presented a copy of the federal court's restraining order to Hufford that Bier was permitted to drive, albeit only on some of his previously scheduled mounts.

This is the point at which the State clearly became involved in Alatis' otherwise private actions in this case. It may have been one thing for Painesville's private security personnel to deny Bier admission to the racetrack; however, it was quite another for the racing officials, who had previously allowed Bier to be listed as the driver of various horses to be raced on August 12, subsequently to remove his name or to refuse to program him solely on Alatis' orders. The racing judges (although paid by the private permit holder) are given broad authority, by statute and by the Commission, to enforce the rules

of the commission, including the express power to suspend licenses and to impose fines. (See, e.g. Ohio Revised Code §3769.091; Rule 3769-5-27). Indeed, the Presiding Judge, while paid by the permit holder, is actually appointed by the Commission. (Rule 3769-5-27). He is the representative of the Commission at the racetrack, and has authority over all persons licensed by the Commission, including the private permit holder. Whenever these officials make decisions that affect the actual races at a racetrack, such as Northfield Park, particularly decisions as to who may enter the races, or as to who may

drive, they are acting in their official capacities, as Commission representatives, and not as private employees of the permit holder. ¹⁰

At no time did Alatis or the racing officials inquire of Bier as to his training status prior to taking this action. Moreover, the racing officials made no inquiry as to whether Bier's purported lack of training status would have any

¹⁰ The dichotomous situation in which racing judges find themselves is not unlike that of the proverbial servant trying to serve two masters. Refusing to obey the orders of the permit holder may be tantamount to "biting the hand that feeds" them. However, the solution to this awkward situation lies with the State of Ohio and the Racing Commission, not with this Court.

adverse effect on the horses he would drive or on the races in which he was entered as a driver. They simply summarily excluded Bier, and by so doing they participated in, or "put their weight" behind, Alatis' actions. See Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 599-600 (3d Cir. 1979).

Defendant Alatis attempts to analogize this case to that of Fulton v. Hecht, 545 F.2d 540 (5th Cir.), cert. den., 430 U.S. 984 (1977). This case is analogous to Fulton only insofar as the regulations, and the mutual financial benefits that inure to the private associations and the States

of Ohio and Florida are similar. Here, however, we are dealing with a situation where the State of Ohio does regulate and control who will drive in harness races by issuing driver-trainer licenses, and also by regulating the circumstances under which the licenses, and concomitantly the right to drive, can be taken away. (See, e.g., Rules 3769-3-23, 3769-3-27). The facts here are certainly more akin to those in Fitzgerald, supra, where the racing officials actually participated in the challenged activity of the regulated entity, than to those in Fulton where the State had no connection with booking

contracts at the private kennel club.

The Court finds that not only has the State been shown to be sufficiently connected with the challenged conduct of Alatis to pass the close nexus test of Jackson; the State racing officials have been shown to have actually participated in Alatis' actions even more blatantly than did the racing officials in Fitzgerald. Because of this intimate involvement by the State, the Court finds Alatis' actions of excluding Bier from racing to be state action for purposes of the Fourteenth Amendment and §1983.

Having found the presence of state action, we now turn to whether Bier had a constitutionally protected interest in racing at Northfield Park during the Painesville Meet. The Ohio Revised Code and the racing rules promulgated by the Commission specifically provide the circumstances under which driver-trainer licenses may be revoked, denied, or suspended. Thus, it is clear that Bier had a property interest in his harness race license sufficient to invoke the protection of the due process clause. See Barry v. Barchi, 99 S.Ct. 2642 (1979).

Bier's sole occupation is that of a harness race driver and trainer. The only method by which he can engage in his chosen occupation is by training and driving horses in harness race meets. This Court is of the opinion that the right to drive on the racetracks in Ohio and to pursue his occupation, which is derived from the license granted and protected by the state, constitutes a liberty interest within the meaning of the Fourteenth Amendment. See Board of Regents v. Roth, 408 U.S. 564 (1972). Hence, Bier could not be deprived of his interest in driving at Northfield Park during the

Painesville Meet without procedural due process.

It is undisputed that neither Alatis nor the racing officials held any type of hearing prior to excluding Bier. The due process clause contemplates some kind of prior hearing, however informal, before a person is deprived of a protected interest, "except for extraordinary situations where some valid governmental interest is at stake that justified postponing the hearing until after the event."

Boddie v. Connecticut, 401 U.S. 371, 377 (1971). See Barry v. Barchi, supra. Alatis' expressed concern for the protection of the integrity

of racing and conditions of horses as the reason for his "rule" is insufficient to qualify as an extraordinary situation which would warrant Bier's exclusion without a prior hearing. ¹¹ Additionally, there was no evidence that Bier had conducted himself in any manner which would warrant concern by Alatis or the racing officials sufficient to immediately exclude him from racing. In other words, there were no extenuating

¹¹ Alatis' concern was unfounded since the insurer and responsibility rules of the Racing Commission (3769-3-22 and 3769-12-02) protect these interests.

circumstances present here that would require Alatis and the racing officials to exclude Bier without prior notice and an opportunity to be heard. Moreover, there was no offer made to Bier of a subsequent hearing as required by those cases where extenuating circumstances do exist, justifying a deprivation without a prior hearing. See Barry v. Barchi, supra. Under these circumstances, due process would require the state, taking the same or similar action, to accord Bier procedural rights. Having found state action here, the same was required of Alatis, and the failure

to accord Bier those rights violated
the Fourteenth Amendment and §1983.

II. The August 24, 1977 Claim

There can be no question but
that the alleged conduct by
defendant Fleming satisfies the
"under color of state law" element
of this §1983 action, because he was
a state employee in a position of
considerable authority. There also
can be no question but that Bier had
a property interest in his license,
on August 24, 1977, which entitled
him to the procedural safeguards of
the Fourteenth Amendment. See Barry
v. Barchi, supra.

The sole question is whether
there was a deprivation of Bier's

protected interest in his license on August 24, 1977, without due process of law. Defendant Fleming claims that there was no deprivation on August 24; arguing that the letter to Bier on that date, over Fleming's signature, merely evidenced a determination by the Commission that Bier's license ought to be revoked, and that Bier would be given an opportunity to be heard. Fleming further contends that he caused this "notice letter" to be sent to Bier after it was approved by counsel; and that he was simply following orders he received from the Commission after its "emergency telephone meeting". This Court has

no difficulty construing the August 24 letter to Bier as notice that his license had been revoked, and that he would be afforded the opportunity to have a post-revocation hearing.

Bier contends that his license revocation was in violation of Ohio Revised Code, Section 119.06, which requires that a hearing be provided prior to the revocation. Violation of a state statute, however, does not automatically give rise to a constitutional due process violations. Constitutional due process requires that some form of hearing be provided before an individual is finally deprived of a property interest. Ordinarily, a

prior hearing is contemplated, but there are circumstances (as noted above) under which prompt post termination hearings are permissible. While the circumstances of this case do not come within those cases allowing post termination hearings, the Commission did stay its revocation action, and did provide Bier a hearing within two weeks of the revocation decision. However, this is not the problem that the Court has with this case. It is a fundamental requirement of due process that the opportunity to be heard be granted not only at a meaningful time, but also in a

meaningful manner (Armstrong v.
Manzo, 380 U.S. 545, 552 (1965)).
One must wonder how meaningful a
hearing can be provided an
individual when it is held before
the same tribunal that had already
made the decision to deprive him of
his property interest before the
hearing was ever held. Indeed, the
decision not to accord Bier his
procedural rights must be construed
as a conscious one in light of the
fact that the Commission was advised
by its counsel that Bier had to be
afforded a hearing before his
license could be revoked. This was
not a hearing to show cause why
Bier's license should not be

revoked, as defendant Fleming contends. Rather, it was a hearing to legitimize an action already taken by the Commission two weeks previously. There was no meaningful opportunity for Bier to be heard under these circumstances.

Additionally, any opportunity Bier may have had to receive a fair and impartial review of the Commission's proceedings was frustrated by the fact that defendant Fleming failed (or refused) to file the transcript of the "revocation" proceedings with the Common Pleas Court once Bier had appealed its action.

This Court concludes from the circumstances of this case, that the

entire matter of Bier's revocation by the Ohio State Racing Commission, and specifically defendant Fleming's actions, were intricately related to the fact that for some reason, which was never revealed during the trial of this case, ¹² neither Alatis nor the Racing Commission wanted Bier to drive during the Painesville Meet. Accordingly, the Court rules that Bier's due process rights were

¹² Alatis' catchdriver "rule" certainly was not the reason because evidence adduced at trial, including Alatis' own testimony, revealed that a number of catchdrivers continued to enjoy racing privileges during the Painesville Meet at the time time that Bier was experiencing these difficulties.

violated by the revocation of his license in this case, and specifically by defendant Fleming's participation in that revocation.

III. The January 2, 1978 Claim

To determine whether Bier had a constitutionally protected interest in his license or in driving at Northfield Park on January 2, 1978, the Court must look to Ohio law to ascertain the nature of the license.

(See Board of Regents v. Roth, 408 U.S. 564). Ohio Revised Code, §3769.03 provides that licenses issued by the Commission to persons engaged in racing "shall be for the period of one year from January first of the year in which" they are

issued. Thus, it is clear that, under Ohio law, Bier's 1977 license expired on December 31, 1977.

It is not necessary to determine whether the Rules of the Commission support a legitimate claim of entitlement to a renewal of Bier's license (See Perry v. Sindermann, 408 U.S. 593). The only evidence adduced at trial with regard to Bier's January 2, 1978 claim demonstrated that Presiding Judge Billy George removed Bier from his mounts on that date. Although this Court suspects that the events of January 2, 1978 were all a part of the scenario that began in August, 1977, George unequivocally

testified that none of the defendants in this case instructed him, or were involved in his decision, to remove Bier from his mounts. There was no other evidence to show that George acted for any reason other than his stated reason--i.e., Bier did not have a 1978 license. Accordingly, Bier's claimed due process violation on January 2, 1978 must be dismissed.

RELIEF

The basic purpose of a §1983 damages award is to compensate persons for injuries that are caused by the deprivation of constitutional rights. Carey v. Piphus, 435 U.S. 247 (1978). In this case, the

potential for actual loss to plaintiff Bier was greatly minimized by the zealousness of his counsel, who reacted diligently whenever there was an interference by the defendants with Bier's driving rights, or his license. Therefore, the substantial losses to Bier that can actually be computed are probably those he sustained by way of having been required to pay attorney's fees throughout the entire period under question.

The only evidence presented at trial with regard to Bier's loss as a result of Alatis' action of excluding him from racing on August 12, 1977, was the three drives lost

on that evening. The usual amount that Bier would have been paid for those drives was \$10 per drive, or ten percent of the purse of any race he won. Although there was evidence that Bier is an excellent driver who has won many races, the Court certainly cannot speculate that he would have won any of the three races in which he was not allowed to participate. Accordingly, the Court awards Bier \$30 in compensatory damages for the August 12, 1977 due process violation, in addition to attorney's fees.

The Court construes the Complaint as alleging that defendant Fleming acted in his personal as

well as in his official capacities. Fleming properly contends that he is immune from Bier's claims for money damages in his official capacity because money damages are barred from the Eleventh Amendment.

Fleming further contends that he acted in good faith by relying on the advice of counsel and by acting in accordance with routine office procedures. The Court finds these contentions to be without merit.

The evidence shows that Fleming did not rely on the advice of counsel. Counsel advised him that a hearing would have to be provided Bier prior to any revocation action. Despite this advice, Fleming sent

the letter to Bier which revoked his license on August 24, 1977, knowing that Bier was entitled to a prior hearing. The Court would hope that this is not routine office procedure for the Ohio Racing Commission.

The evidence does not show that Bier lost any drives as a result of the August 24 violation. However, "[b]ecause the right to procedure due process is 'absolute' in the sense that it does not depend on the merits of a claimant's substantive assertions, . . . the denial of procedural due process . . . [is] actionable for nominal damages without proof of actual damages."

Carey v. Piphus, supra at 267.

Therefore, the Court finds that he is personally liable to Bier in the amount of \$1.00 for compensatory damages. The Court further awards Bier attorney's fees, against defendant Fleming in both his personal and official capacities.

It is further ordered that plaintiff's counsel prepare and file with the Court documentation of the amount of attorney's fees by September 7, 1981. The defendants may file any objections within ten (10) days thereafter.

The above Findings of Fact and Conclusions of Law are entered pursuant to Rule 52 of the Federal Rules of Civil Procedure. Costs are

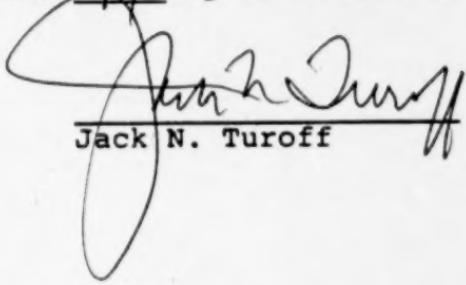
to be born by defendants Alatis and
Fleming.

IT IS SO ORDERED.

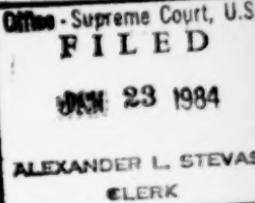
/s/ ANN ALDRICH
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

SERVICE

I certify that three copies of the foregoing Petition were mailed U.S. Postage prepaid to John G. Papandreas and Jonathon H. Soucek, Attorneys for Respondent, Charles Alatis at 706 Citizens Building, Cleveland, Ohio 44114 and to William McDonald, Attorney for Respondent Paul D. Fleming at the State Office Tower, Columbus, Ohio 43215 on this 14 day of December, 1983.



Jack N. Turoff



CASE NO. 83-996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ARTHUR LANCE BIER,

Petitioner,

v.

PAUL D. FLEMING, JR., and
CHARLES I. ALATIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT FLEMING'S BRIEF IN
OPPOSITION TO PETITION FOR CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

WILLIAM J. McDONALD
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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

**WHETHER THE COURT OF APPEALS FOR THE
SIXTH CIRCUIT CORRECTLY DETERMINED THAT
THE TRIAL COURT'S DECISION, HOLDING THAT A
STATE OFFICIAL ACTING IN A MINISTERIAL
CAPACITY WAS NOT ENTITLED TO THE DEFENSE
OF QUALIFIED IMMUNITY, WAS NOT SUPPORTED
BY THE RECORD.**

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TABLE OF AUTHORITIES

Cases:

<i>Rice v. Sioux City Memorial Park Cemetery,</i> 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955)	6
<i>United States v. United States Gypsum Co.,</i> 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 749 (1958)	7

STATEMENT OF THE CASE

On August 24, 1977, the Ohio State Racing Commission notified Arthur Bier of their intention to revoke his license as a driver in harness horse races, and of his opportunity to have a hearing on the matter. The hearing was held on September 7, 1977; an order of revocation was issued on September 8, and Bier appealed the order to the Summit County Court of Common Pleas. He raced for the remainder of 1977.

The Complaint in the District Court was filed on January 6, 1978, seeking injunctive relief and damages for violation of state statutes regarding the conduct of administrative hearings, for conspiracy to violate the Plaintiff's civil rights, and for libel and slander. Named as Defendants were Paul D. Fleming, Jr., (the executive secretary of the Ohio State Racing Commission), Henry Stehmeyer (the chief investigator for the Commission), Charles I. Alatis (president and general manager of Painesville Raceway, Inc.), and the Ohio State Racing Commission. None of the five commissioners were individually named as Defendants.

The District Court dismissed all claims against the Ohio State Racing Commission and Mr. Stehmeyer, and dismissed the conspiracy claims and libel and slander claims against Respondent Fleming. The only issue that was tried against Fleming was whether his actions as executive secretary to the Ohio State Racing Commission violated Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983.

Trial was held in February, 1981, and judgment was rendered on August 25, 1981. The District Court found

Fleming liable to Petitioner for nominal damages of one dollar and for attorney fees for his "participation" in the Ohio State Racing Commission's revocation of Petitioner's racing license in August, 1977.

Fleming appealed that judgment to the Court of Appeals for the Sixth Circuit, alleging six assignments of error. The Court of Appeals sustained one of those assignments, which concerned the issue of qualified executive immunity, but did not rule on Fleming's other assignments of error, which concerned Petitioner's successful utilization of Ohio's Administrative Procedure Act, whether or not Fleming "caused" a deprivation of Plaintiff's property without due process, and if so, whether Plaintiff was "injured" as a result. The Court of Appeals reversed and remanded with directions to dismiss the Complaint, and it is from this judgment that Petitioner has sought certiorari.

On October 19, 1983, the District Court dismissed the Complaint pursuant to remand.

STATEMENT OF FACTS

The Ohio State Racing Commission is composed of five members, appointed by the Governor. Respondent, Paul D. Fleming, Jr., at the time of the events *sub judice*, was the executive secretary of the Commission.¹ The executive secretary is not a member of the Commission; he is only an employee. The duties of the executive secretary are set forth in R.C. Section 3769.021:

1. Although not a matter of record in this case, Respondent Fleming has since retired, and another person has assumed the position of executive secretary.

The state racing commission shall appoint a secretary who shall serve during the pleasure of the commission.

* * *

The secretary *shall* attend all meetings of the commission. He shall keep a complete record of its proceedings. . . .

He *shall* be the executive officer of the commission and be responsible for keeping all commission records and the carrying out of the rules, regulations and orders of the commission. He *shall* perform such other duties as the commission prescribes.

(Emphasis added.)

Petitioner, Arthur Bier, had been licensed by the Commission as a driver of standardbred horses. But the Commission licenses approximately 20,000 people each year, and Petitioner was not known by Respondent.

In August, 1977, the Commission received information indicating that Petitioner's Ohio standardbred license should be revoked for violation of the Ohio Rules of Racing, Chapter 3769 of the Ohio Administrative Code. As a result, a Commission meeting was called by the Chairman, and the commissioners decided to provide Petitioner a hearing on the matter of whether or not his license should be revoked.

After the meeting, Respondent Fleming performed his ministerial, statutory duty as the Commission's

executive secretary by causing a draft of a letter to be prepared notifying Petitioner of the Commission's action. This draft was transmitted to George E. Lord, the State's assistant attorney general who was representing the Racing Commission at that time, for his review. The draft, in pertinent part, stated:

It has come to the attention of the Ohio State Racing Commission that you are listed as being in bad standing before the New York State Racing and Wagering Board. Pursuant to Rule 3769-3-23 (B) of the Ohio Rules of Racing your license as Driver-Trainer in the State of Ohio is hereby revoked by action taken by said Commission on August 24, 1977.

You are further advised that if you request it within 30 days of the mailing of this letter, you are entitled to a public hearing on the question of said revocation of your Driver-Trainer license.

Attorney Lord did not approve the draft as it was presented to him. Instead, he crossed out the last clause in the first paragraph ("by action taken by said Commission on August 24, 1977"), and with that correction he approved the draft. After writing "Draft OK G.E.L." on the draft, he returned it to Respondent. Thus, the draft now appeared as follows:

It has come to the attention of the Ohio State Racing Commission that you are listed as being in bad standing before the New York State Racing and Wagering Board. Pursuant to Rule 3769-3-23 (B)

of the Ohio Rules of Racing your license as Driver-Trainer in the State of Ohio is hereby revoked ~~by action taken by said Commission on August 24, 1977.~~

You are further advised that if you request it within 30 days of the mailing of this letter, you are entitled to a public hearing on the question of said revocation of your Driver-Trainer license.

After receipt of the approved, corrected draft, Respondent caused a notice letter to be sent to Petitioner. The letter contained the exact same language, no more and no less, as the draft approved by Attorney Lord.

Upon receipt of the notice letter, Petitioner requested a hearing before the Commission, and a hearing was held two weeks later, on September 7, 1977. After the hearing, the Commission voted to revoke Petitioner's license, and he appealed the revocation to one of Ohio's common pleas courts pursuant to Ohio's Administrative Procedure Act. A stay was granted by the common pleas court, and Petitioner was permitted to race for the remainder of 1977, when his license expired.

Petitioner filed his Complaint in the federal district court in January, 1978, when the Commission attempted to deny Petitioner a 1978 license.

SUMMARY OF ARGUMENT

This Honorable Court should not grant certiorari in this case for the following reasons: the case presents no matters of national interest; the decision of the court

below is not of such character as to be considered special and important under Supreme Court Rule 17.1 (a); and review by this Court would only confirm the reasoning and result of the court below.

ARGUMENT IN OPPOSITION TO CERTIORARI

This Honorable Court should not grant certiorari in this case as the matter involves only individual relief and presents no matters of national interest. The Supreme Court does not sit for the benefit of particular individual litigants, and certiorari should only be granted in cases where the Court must settle principles of importance to the public interest as distinguished from that of the parties. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

The sole rationale advanced by Petitioner to justify certiorari is that the Sixth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. While this is a reason expressly listed in Supreme Court Rule 17.1 (a) as being of the character that will be considered special and important by the Court, the Opinion of the Sixth Circuit hardly constitutes such a departure.

The Sixth Circuit determined that the District Court's conclusion that Respondent drafted and signed the August 24, 1977, letter against the advice of counsel was unsupported by the Record. This determination was arrived at after a careful review of the Record and of the District Court's findings of fact and conclusions of law.

Petitioner erroneously claims that the Sixth Circuit "considered only part of the evidence and totally disregarded the findings of fact. . .that George Lord had informed Fleming that a hearing was necessary before he could revoke Bier's license." (Petition for Certiorari, pp. 29-30.) In fact, the Sixth Circuit squarely considered this finding of fact. (Opinion of September 19, 1983, p. 7, contained at p. 52 of the Appendix to the Petition for Certiorari.) The Sixth Circuit correctly concluded, however, that this finding of fact was likewise unsupported by the Record, and that Fleming was entitled to the defense of qualified, good faith immunity. (Appendix to the Petition for Certiorari, p. 53.)

In addition, Petitioner erroneously claims that review of the District Court's findings of fact is outside the scope of the Appellate Court's review. On the contrary, the principle has been well established that when, upon review of the evidence, the appellate court is left with the definite and firm conviction that a mistake was made, the finding of fact will be set aside. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1958).

Finally, Respondent submits that this Honorable Court should not grant certiorari in this case because a ruling on the merits in Petitioner's favor would result in, at best, a remand to the Sixth Circuit for consideration of the other assignments of error raised by Respondent but not ruled upon by the Appellate Court. The Court below stated that "For purposes of this inquiry we assume, without deciding, that Bier did suffer a constitutional deprivation without due process of law." (Appendix to Petition for Certiorari, pp. 57-58.) Thus, four of Respondent's six assigned errors were not ruled upon.

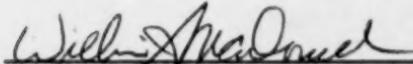
CONCLUSION

The legal issue which Petitioner is attempting to raise is founded upon inaccurate representations of the Sixth Circuit's Opinion, as well as unsupported and inaccurate statements of law. Moreover, resolution of the issue presents no question of general or substantial national public interest. Finally, certiorari would necessitate review of the trial court's findings of fact, as well as the transcript of the trial, and would only confirm the reasoning and result of the Court of Appeals.

WHEREFORE, Respondent asks this Court to *deny* the petition for certiorari.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio


William J. McDonald

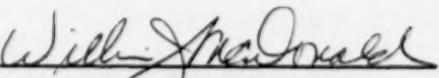
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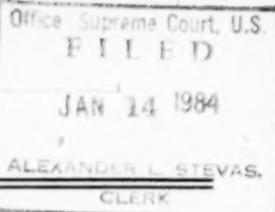
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent Fleming's Brief in Opposition to Petition for Writ of Certiorari has been forwarded to the Petitioner through the office of his Counsel of Record, Jack N. Turoff, 1127 Euclid Avenue, Cleveland, Ohio 44115 and to Respondent Charles Alatis through the office of his Counsel of Record, John G. Papandreas and Jonathan H. Soucek, 706 Citizens Building, Cleveland, Ohio 44114. I further certify that all persons required to be served have been so served. Said mailing was made by depositing the appropriate number of copies in the U.S. Mail, first class, postage prepaid, this 20th day of January, 1984.



WILLIAM J. McDONALD
Counsel of Record



No. 83-996

In the Supreme Court of the United States

October Term, 1983

ARTHUR LANCE BIER,
Petitioner.

vs.

PAUL D. FLEMING and CHARLES I. ALATIS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

**RESPONDENT, CHARLES I. ALATIS'
BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI**

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Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the Sixth Circuit Court of Appeals holding that a private individual did not act under color of state law within the ambit of 42 U.S.C. Section 1983, is correct and not in conflict with a decision of the Third Circuit Court of Appeals.

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<i>Fitzgerald v. Mountain Laurel Racing, Inc.</i> , 607 F.2d 589 (3d Cir. 1979), cert. denied, 446 U.S. 956 (1980)	3
<i>Fulton v. Hecht</i> , 545 F.2d 540 (5th Cir.), cert. denied, 430 U.S. 984 (1977)	3
<i>Martin v. Monmouth Park Jockey Club</i> , 145 F. Supp. 439 (D.N.J. 1956), aff'd, 242 F.2d 344 (3d Cir. 1957)	3

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No. 83-996

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

**RESPONDENT, CHARLES I. ALATIS'
BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI**

GROUNDS FOR JURISDICTION

Respondent agrees that Petitioner has timely filed with this Honorable Court his Petition for Certiorari.

STATEMENT OF CASE

Painesville Raceway, Inc., an Ohio corporation, was at all times material to this proceeding a licensed permit holder authorized by the laws of the State of Ohio to

conduct harness horse racing meets at Northfield Park, Northfield, Ohio.

Respondent, Charles I. Alatis, was the President and General Manager of Painesville Raceway, Inc.

The harness horse racing meet commenced on August 12, 1977, and concluded on November 12, 1977.

On August 8, 1977, Respondent, Charles I. Alatis, notified Petitioner that he had failed to submit an application for stall space in the upcoming meet and, therefore, would have to vacate stall space utilized by Petitioner in a prior meet. Additionally, Petitioner was advised that it had come to the attention of Respondent, Charles Alatis, that Petitioner did not have trainer responsibility and, therefore, Painesville Raceway, Inc. classified Petitioner as a catch-driver. Painesville Raceway did not permit catch-drivers and Petitioner was, accordingly, refused entry to the Northfield Park premises and his name was removed from the August 12, 1977 program. By virtue of a temporary restraining order from the district court, Petitioner participated in the entire Painesville Raceway meet.

The district court held that Respondent, Alatis' conduct constituted action under color of state law pursuant to 42 U.S.C., Section 1983.

The Court of Appeals held that Petitioner failed to demonstrate the requisite degree of state action necessary to maintain a claim for relief under 42 U.S.C., Section 1983, and, accordingly, reversed the district court's decision and order the complaint dismissed.

Respondent, Charles I. Alatis, respectfully requests this Honorable Court to deny certiorari.

ARGUMENT IN OPPOSITION TO THE GRANTING OF CERTIORARI

Contrary to the assertions of Petitioner, Respondent, Charles I. Alatis, respectfully represents that the decision of the Sixth Circuit Court of Appeals is correct under law and not in conflict with a decision of the Third Circuit Court of Appeals. Moreover, Respondent submits that the Sixth Circuit Court of Appeals' decision is consistent with the decisions of other circuits as well as decisions by this Honorable Supreme Court.

In the case at bar, the Sixth Circuit Court of Appeals clearly distinguished its decision from the Third Circuit decision in *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir. 1979), cert. denied, 446 U.S. 956 (1980) (Petitioner's Appendix 49-51). The Sixth Circuit specifically found that the factors which led to the decision of the Third Circuit were absent in the case at bar (Petitioner's Appendix 50).

Moreover, Respondent respectfully submits that the decision of the Sixth Circuit is consistent with the following decisions: *Fulton v. Hecht*, 545 F.2d 540 (5th Cir.), cert. denied, 430 U.S. 984 (1977) (cited by the Sixth Circuit); *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439 (D.N.J. 1956), aff'd, 242 F.2d 344 (3d Cir. 1957) (reaffirmed by the Third Circuit in *Fitzgerald*, *supra* at 597); and *Evans v. Arkansas Racing Commission*, 606 S.W.2d 578 (Supreme Court of Arkansas, 1980), cert. denied, 451 U.S. 910, 101 S. Ct. 1980 (1981).

In conclusion, Respondent, Charles I. Alatis, submits that the decision of the Sixth Circuit Court of Appeals is correct under law and not in conflict with the decision of the Third Circuit Court of Appeals.

Accordingly, Respondent, Charles I. Alatis, urges this Honorable Supreme Court to deny the Petition for Certiorari.

Respectfully submitted,

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